

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

ALLSTAFF, INC.,	:	
	:	C.A. No: 10C-02-014 (RBY)
Plaintiff,	:	
	:	
v.	:	
	:	
WILMINGTON TRUST COMPANY,	:	
	:	
Defendant.	:	

Submitted: July 30, 2010
Decided: September 7, 2010

Upon Consideration of Defendant's
Motion to Dismiss
GRANTED

OPINION AND ORDER

Evan O. Williford, Esq., The Williford Firm LLC, Wilmington, Delaware for Plaintiff.

Seth J. Reidenberg, Esq., The Chartwell Law Offices, LLP, Wilmington, Delaware for Defendant.

Young, J.

SUMMARY

_____Defendant Wilmington Trust Company (“WTC”) moves to dismiss Plaintiff Allstaff, Inc.’s (“Allstaff”) Complaint on the grounds that: (1) this Court lacks subject matter jurisdiction to hear the Racketeer Influenced and Corrupt Organization Act¹ (“RICO”) claims;² (2) Plaintiff fails to state a claim upon which relief can be granted;³ and (3) Plaintiff has not joined a necessary party.⁴ Additionally, WTC contends that each of Allstaff’s claims is barred by the applicable statute of limitations, as well as the doctrine of collateral estoppel.

Allstaff counters that, not only does this Court have concurrent jurisdiction over the RICO claims, there are no statute of limitations issues with any of the claims, because Allstaff’s claims were tolled by Delaware’s Savings Statute.⁵ Because the remedial protections of Delaware’s Saving Statute do not apply to the facts and circumstances in the instant case, WTC’s Motion to Dismiss is **GRANTED**.

¹ 18 U.S.C. § 1961 *et. seq.*

² Pursuant to Super. Ct. Civ. R. 12(b)(1).

³ Pursuant to Super. Ct. Civ. R. 12(b)(6).

⁴ Pursuant to Super. Ct. Civ. R. 12(b)(7).

⁵ *See* 10 *Del. C.* § 8118(a).

FACTS⁶

Allstaff, a Delaware corporation, supplied temporary laborers to businesses working in the construction and related industries. Its president and sole stockholder is, and at all times was, William Boyd (“William”). According to William, in 2004, Allstaff was a successful, profitable business with over 100 business clients.

Allstaff had a business checking account in its name at the Newport branch of WTC. Allstaff submits that the only authorized signatory on the account was William.

According to Allstaff, it was victimized by a massive embezzlement scheme knowingly facilitated by WTC. Allegedly, an Allstaff employee, John Boyd, Jr. (“Jack”), who is William’s brother, stole checks that had been written to Allstaff, and submitted to them for deposit into the WTC account of Jack’s Business, Jack Boyd’s Action Employment, Inc (“the AE account”). William had not signed the back of the embezzled checks – in fact, the checks were not endorsed at all. The alleged embezzlement began in October 2004, and was discovered in early November 2005.⁷

It is Allstaff’s contention that, after it discovered Jack’s purported wrongdoing and relayed this information to WTC, WTC did nothing. Allstaff advances that WTC acknowledged its complicity in allowing Jack to deposit unendorsed Allstaff checks into the AE account. Moreover, Allstaff maintains that, because doing so would have

⁶ The majority of the facts is taken from the allegations of the Complaint.

⁷ Although the exact date of the embezzlement discovery is unclear, the parties appear to agree on November 8 or 9, 2005 as the approximate date of discovery.

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acknowledged its wrongdoing, WTC refused to stop depositing embezzled checks in the future.

PROCEDURAL POSTURE

On June 12, 2007, after repeated unsuccessful attempts at obtaining counsel, William filed *pro se* against WTC in United States District Court for the District of Delaware seeking damages on behalf of Allstaff based on the same facts asserted here. Although damages were sought on behalf of Allstaff, William sued WTC individually. On June 24, 2009, the District Court issued an opinion granting summary judgment in WTC's favor.⁸ On February 9, 2010, Allstaff filed the instant action.

Allstaff asserts four claims against WTC: conversion (common law and under Article Three of the Delaware UCC) ("Count I"); aiding and abetting Jack's conversion, embezzlement, and breach of employee duty ("Count II"); negligence ("Count III"); and RICO violations ("Count IV"). Allstaff seeks compensatory, treble, and punitive damages for WTC's alleged wrongful conduct.

STANDARD OF REVIEW

"A motion to dismiss under [Superior Court Civil] Rule 12(b)(6) presents the question of 'whether a plaintiff may recover under any reasonably conceivable set of

⁸ *William Boyd v. Wilmington Trust Co.*, 630 F. Supp. 2d 379 (D. Del. 2009).

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circumstances susceptible of proof under the complaint.”⁹ “When considering a motion to dismiss, the Court must read the complaint generously, accept all well-[pled] allegations as true, and construe them in a light most favorable to the plaintiff.”¹⁰ “A complaint is ‘well-plead’ [sic] if it puts the opposing party on notice of the claim being brought against it.”¹¹ “Dismissal is warranted only when ‘under no reasonable interpretation of the facts alleged could the complaint state a claim for which relief might be granted.’”¹²

DISCUSSION

Although WTC asserts alternate grounds supporting the dismissal of Allstaff’s claims, the linchpin of WTC’s argument is the statute of limitations defense. Given that the Court’s ruling on this defense could render WTC’s other contentions moot, the Court will first address the statute of limitations issues. All of WTC’s tangential assertions will, thereafter, be addressed to the extent later described.

I. State Law Claims

Count I, Count II, and Count III of Allstaff’s Complaint are all state law claims.

⁹ *Boyce Thompson Inst. for Plant Research v. MedImmune, Inc.*, 2009 WL 1482237, at *4 (Del. Super. Ct. May 19, 2009) (citing *Browne v. Robb*, 583 A.2d 949, 950 (Del. 1990) (“The complaint sufficiently states a cause of action when a plaintiff can recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint”)).

¹⁰ *Id.* (citing *In re Tri-Star Pictures, Inc. Litig.*, 634 A.2d 319, 326 (Del. 1993) (citations omitted)).

¹¹ *Id.* (citing *Precision Air v. Standard Chlorine of Del.*, 654 A.2d 403, 406 (Del. 1995)).

¹² *Id.* (citing *Hedenberg v. Raber*, 2004 WL 2191164, at *1 (Del. Super. Aug. 24, 2004)).

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As such, these claims are subject to a three-year statute of limitations, pursuant to 10 *Del. C.* § 8106. All parties agree that Jack’s alleged embezzlement was discovered on or about November 9, 2005. The limitations period, therefore, expired on these state law claims on November 9, 2008. The issue here, however, is whether William’s timely filed District Court action succeeded in tolling the statute of limitations under 10 *Del. C.* § 8118(a), Delaware’s Savings Statute. The Court finds that it did not.

Delaware’s Savings Statute, 10 *Del. C.* § 8118(a) provides, in relevant part, that:

[i]f any action duly commenced within the time limited therefor in this chapter, the writ fails of a sufficient service or return by any unavoidable accident, or by any default or neglect of the officer to whom it is committed; *or if the writ is abated, or the action otherwise avoided or defeated by the death of any party thereto, or for any matter of form; . . .* a new action may be commenced, *for the same cause of action*, at any time within one year after the abatement or other determination of the original action[.] (emphasis added)

In other words, “the [Delaware Savings] statute is ‘designed to allow a plaintiff... one year to file a second cause of action following a final judgment adverse to his position *if such judgment was not upon the merits of the cause of action* [and the terms of the statute are otherwise satisfied].”¹³ Therefore, for purposes of the present motion,

¹³ *O’Donnell v. Nixon Unif. Serv., Inc.*, 2003 WL 21203291, at *3 (Del. Super. May 20, 2003) (quoting *Gosnell v. Whetsel*, 198 A.2d 924, 926 (Del. 1964)) (emphasis added).

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“the statute[,] [if applicable] [,] has two alternative prongs: a prong that applies whenever ‘the writ has abated,’ and a prong that applies whenever the action is ‘avoided or defeated ... for any matter of form.’”¹⁴ “Plaintiff[] need only satisfy one.”¹⁵

The question, therefore, is whether the District Court’s granting of summary judgment was or was not “upon the merits.” If the District Court’s disposition of the case is determined to be “on the merits,” the Savings Statute will not apply, and WTC’s statute of limitations defense will prevail. If, however, the District Court’s disposition of the case is determined to satisfy one of the Savings Statute’s prongs – abatement of a writ or defeat for any matter of form – the Savings Statute will apply, and WTC’s statute of limitations defense will fail.

Allstaff argues that the District Court’s decision constituted “abatement” and dismissal as a “matter of form,” because summary judgment was based, in part, on William’s lack of standing and jurisdictional issues. The Court is not persuaded by this argument.

Delaware courts have found a “writ to be abated” when faulty or inadequate service of process has occurred.¹⁶ With regard to the second alternative prong of the statute, i.e. the “avoiding” or “defeating” of the action “for any matter of form,” Delaware courts have concluded that “this prong of the statute is directed toward

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *See Gosnell*, 198 A.2d at 927; *Giles v. Rodolico*, 140 A.2d 263, 267 (Del. 1958).

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instances such as lack of jurisdiction or filing in the wrong venue” as well as lack of subject matter jurisdiction and technical flaws.¹⁷

Furthermore, in *Wilt v. Smack*, a case cited by the Delaware Supreme Court in the *Gosnell* case, the United States District Court for the Eastern District of Pennsylvania construed Delaware’s Saving Statute, which, at the time was 10 *Del. C.* § 8117. After reviewing the authority on savings statutes, the Court concluded:

Clearly the tenor of these decisions is that grounds for dismissal which *do not touch the merits of a controversy* are within the spirit, if not the letter, of the . . . (saving statute) . . . so that, after dismissal on such a ground, institution of a second action is permissible despite the intervention of the period of limitations . . . A liberal construction of the Delaware statute therefore seems authorized, and it leads to the conclusion that the rights of the plaintiff, who filed a timely action which was dismissed on a ground *unrelated to the merits*, should be preserved notwithstanding the intervention of the bar of the statute of limitations.¹⁸

This Court finds that the Savings Statute does not apply to the instant action. The law in Delaware is clear. Summary judgment is a final judgment on the merits.¹⁹ “A judgment on the merits does not necessarily call for a judgment based upon a trial

¹⁷ See *O’ Donnell*, 2003 WL 2103291, at *5; *Howmet Corp. v. City of Wilmington*, 285 A.2d 423, 427 (Del. Super. Nov. 24, 1971)

¹⁸ *Wilt v. Smack*, 147 F. Supp. 700, 703 (E.D. Pa. 1975).

¹⁹ See *Hubicki v. ACF Indus., Inc.*, 484 F.2d 519, 524 (3d. Cir. 1973); *Allied Artists Pictures Corp. v. Baron*, 413 A.2d 876, 878 (Del. 1980); *Taylor v. Desmond*, 1990 WL 18366, at *2 (Del. Super. Jan. 25, 1990) (additional citations omitted).

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of the contested facts.”²⁰ “Specific findings are not required to have the effect of precluding new litigation on an issue.”²¹ “A finding which is implicit in a judgment can also have this effect.”²² Furthermore, the Savings Statute only applies when a dismissal is “without prejudice.”²³

This Court finds that this judgment was “on the merits” and “with prejudice” – a determination which precludes application of the Savings Statute. The District Court discussed the substance of William’s claims, and found them to be without merit. The District Court afforded William wide latitude in his presentation and its consideration of his case. Even with this leeway, William’s claims were held to be inadequate as a matter of law. The District Court based its opinion largely on that inadequacy. Although the District Court addressed William’s standing and jurisdictional issues, the District Court’s ultimate decision rested upon its consideration of the merits of the case. Based on its conclusions, a judgment in favor of WTC was entered. No appeal was pursued.

Moreover, a balancing of the equities may be entertained when considering the applicability of the Delaware Savings Statute.²⁴ It was “designed to mitigate against

²⁰ *Taylor*, 1990 WL 18366 at *2 (citation omitted).

²¹ *Id.* (citation omitted).

²² *Id.* (citation omitted).

²³ *Savage v. Himes*, 2010 WL 2006573, at *3 (Del. Super. May 18, 2010) (citing *Small v. MBNA America*, 2008 WL 4365895, at *2 (Del. Super. July 7, 2008)).

²⁴ *Towles v. Mastin*, 2007 WL 3360034, at *2 (Del. Super. Oct. 18, 2007).

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the harshness of the defense of statute of limitations raised against a plaintiff who, *through no fault of his own*, finds his cause *technically barred* by the lapse of time.”²⁵ This concept resonates with the Court.

The instant case is not a situation in which William found himself the pawn in a larger legal game over which he had no control. He strategically chose to sue in District Court, and he consciously decided to represent himself. Additionally, William ultimately “had his day in court.” This day may not have concluded the way he envisioned, but a court considered his claims, and dismissed them. The only resulting prejudice is that William’s bite at the apple turned out not to be so savory.

WTC, on the other hand, will suffer prejudice if it is forced to litigate the same case twice. It defended William’s claim successfully once, and this Court finds no reason to allow William or Allstaff another bite, which is not warranted by the Savings Statute. Therefore, WTC’s Motion to Dismiss is **GRANTED**. Counts I through III of Allstaff’s Complaint are **DISMISSED**.

II. *Federal Claim*

Count IV of Allstaff’s Complaint alleges a RICO violation. As a preliminary matter, this Court has concurrent jurisdiction over civil RICO claims.²⁶ Therefore, the RICO claim will not be dismissed because this Court lacks jurisdiction to hear it.

²⁵ *Giles*, 140 A.2d at 267.

²⁶ *Edge of the Woods v. Wilmington Sav. Fund Soc’y*, 2000 WL 3054448, at *4 (Del. Super. Feb. 7, 2000) (citing *Tafflin v. Levitt*, 493 U.S. 455, 467 (1990)).

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However, as with the state law claims, WTC presents a statute of limitations defense.

The parties agree that the statute of limitations for a RICO claim is four years.²⁷ As was the issue with the state law claims, WTC asserts that the statute of limitations has expired. WTC appears to base its assertion on the “injury discovery” rule. According to the “injury discovery rule,” a statute of limitations would begin to run when the plaintiff knew or should have known of its injury.²⁸ In addition to the injury, the plaintiff must also have known or should have known of the source of its injury.²⁹ Allstaff does not appear to contest the “injury discovery” rule, but attempts to modify it. Allstaff contends that an injury “starts” when the plaintiff discovers the *particular* injury. That is to say, according to Allstaff, although Allstaff was aware of the alleged embezzlement as of November 9, 2005, it did not discover the “injury” of being put out of business until mid-February 2006, when that event occurred. Therefore, counting from that date, when it filed its Complaint in this matter four years later on February 9, 2010, the statute of limitations would not have expired.

That argument is rejected. The “injury discovery” rule is the governing standard in this case. Accordingly, only two requirements are required to trigger the running of the four-year limitations period of a civil RICO claim.³⁰ Allstaff must first

²⁷ *Prudential Ins. Co. of Amer. v. United States Gypsum Co.*, 359 F.3d 226, 232-33 (3d. Cir. 2004) (citing *Agency Holding Corp. v. Malley-Duff & Assoc. Inc.*, 483 U.S. 143, 156 (1987)).

²⁸ *Prudential*, 359 F.3d at 233.

²⁹ *Id.*

³⁰ *Id.* (citing *Forbes v. Eagleston*, 228 F.3d 471, 485 (3d Cir. 2000)).

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have known or should have known of its injury. Second, Allstaff must have known or should have known of the source of its injury. Both of these prongs were satisfied, at the very latest, by November 9, 2005.

On November 9, 2005, Allstaff was aware that checks made out to Allstaff were being deposited into Jack's account. Moreover, Allstaff was aware that Jack was making these deposits at a WTC bank. In short, Allstaff was aware of its injury as well as its origin. Therefore, the statute of limitations began to run on November 9, 2005, and subsequently expired on November 9, 2009 – three months prior to the filing of this lawsuit. While Allstaff may have suffered subsequent injury as a result of Jack's conduct, this later injury does not toll the statute of limitations. Therefore, Count IV of Allstaff's Complaint must be dismissed as well.

WTC's Motion to Dismiss is **GRANTED** as to all claims.

Because the Court's determination with regard to the statute of limitations defense effectively eliminates all of Allstaff's claims, the remaining arguments presented will not be addressed.

SO ORDERED.

/s/ Robert B. Young
J.

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